Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

(4)

No. 04-637

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,
Petitioner,

v.

JOHN DAVID STUMPF,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Is a representation on the record from defendant's counsel and/or the defendant that defense counsel has explained the elements of the charge to the defendant, sufficient to show the voluntariness of the guilty plea under *Henderson v. Morgan*, 426 U.S. 637, 647 (1976)?

2. Does the Due Process Clause require that a defendant's guilty plea be vacated when the State later prosecutes another person in connection with the crime and presents evidence at the second defendant's trial that is allegedly inconsistent with the first defendant's guilt?

LIST OF PARTIES

The Petitioner is Margaret Bradshaw, the current Warden of the Mansfield (Ohio) Correctional Institution.

The Respondent is John David Stumpf, an inmate of the Mansfield (Ohio) Correctional Institution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE AND FACTS 4

A. During the course of robbing the Stouts, Stumpf and Wesley shot both Stouts, killing Mary Jane Stout 5

B. State court proceedings 6

1. Stumpf was indicted for aggravated murder and various other crimes involving the Stout slaying 6

2. Stumpf pleaded guilty in exchange for the prosecutor's agreement to drop two of the three capital specifications on the aggravated murder charge and the three robbery and theft charges 8

Page

3. During the plea colloquy, Stumpf admitted that his attorneys explained the charges to him 9

4. The factual basis hearing corroborated the plea 11

5. The court sentenced Stumpf to death 12

6. Wesley is convicted at trial 13

7. Stumpf moved to withdraw his guilty plea 14

C. Stumpf sought federal habeas relief 15

SUMMARY OF ARGUMENT 17

ARGUMENT 20

A. Stumpf's guilty plea was voluntary and intelligent 20

1. Stumpf's insistence that he was not the triggerman is consistent with his guilty plea to the aggravated murder of Mrs. Stout 21

2. Stumpf's plea was voluntary and intelligent under *Henderson v. Morgan*, as the record confirms that Stumpf's attorneys explained the elements of the charged offenses to him 27

Page

B. The Sixth Circuit's "inconsistent prosecution" theory fails on both the facts and the law 35

1. The theory at Wesley's trial was not "inconsistent" with Stumpf's plea 35

2. Stumpf cannot use federal habeas to collaterally attack his guilty plea 37

3. The Sixth Circuit's decision conflicts with well-established precedent governing claims of prosecutorial misconduct and actual innocence 39

4. Stumpf cannot make an "actual innocence" claim, as no such claim exists in habeas, and, in any event, Stumpf is not actually innocent 42

C. The Sixth Circuit's newly minted due process right poses a serious threat to the finality of guilty pleas 45

CONCLUSION 47

APPENDICES 1a

Appendix A: Constitutional Provisions 1a

Appendix B: Ohio Rev. Code § 2901.22. Culpable mental states 2a

Appendix C: Ohio Rev. Code § 2903.01. Aggravated Murder 3a

Page

Appendix D: Ohio Rev. Code § 2923.03.
Complicity 5a

Appendix E: Ohio Rev. Code § 2929.03.
Imposing sentence for a capital
offense 6a

Appendix F: Ohio Rev. Code § 2929.04.
Criteria for imposing death or
imprisonment for a capital offense 12a

Appendix G: Ohio Rev. Code § 2945.06.
Jurisdiction of judge when jury trial
is waived; three-judge court 15a

Appendix H: Ohio R. Crim. P. 11(C)(3).
Pleas, Rights Upon Plea 16a

TABLE OF AUTHORITIES

Page

Cases

Alcorta v. Texas,
355 U.S. 28 (1957) 40

Blackledge v. Allison,
431 U.S. 63 (1977) 46

Bousley v. United States,
523 U.S. 614 (1998) 44

Boykin v. Alabama,
395 U.S. 238 (1969) 29, 31

Brady v. Maryland,
373 U.S. 83 (1963) 40

Brady v. United States,
397 U.S. 742 (1970) 29, 35, 38, 39

Brecht v. Abrahamson,
507 U.S. 619 (1993) 45

Enmund v. Florida,
458 U.S. 782 (1982) 11

Giglio v. United States,
405 U.S. 150 (1972) 40

Haring v. Prosise,
462 U.S. 306 (1983) 42

Page

Henderson v. Morgan,
426 U.S. 637 (1976) ..... *passim*

Herrera v. Collins,
506 U.S. 390 (1993) ..... *passim*

Jackson v. Virginia,
443 U.S. 307 (1979) 33

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 45

Mabry v. Johnson,
467 U.S. 504 (1984) 19, 37, 38

Marshall v. Lonberger,
459 U.S. 422 (1983) 30, 32

McCarthy v. United States,
394 U.S. 459 (1969) 42

McMann v. Richardson,
397 U.S. 759 (1970) 21

Mooney v. Holohan,
294 U.S. 103 (1935) 40

Napue v. Illinois,
360 U.S. 264 (1959) 40

Schlup v. Delo,
513 U.S. 298 (1995) 43, 44

Page

Smith v. Groose,
205 F.3d 1045 (8th Cir. 2000) 17

State v. Ballew,
667 N.E.2d 369 (Ohio 1996) 23

State v. Cooey,
544 N.E.2d 895 (Ohio 1989) 7, 26

State v. Green,
738 N.E.2d 1208 (Ohio 2000) 26

State v. Scott,
400 N.E.2d 375 (Ohio 1980) 23

State v. Smith,
684 N.E.2d 668 (Ohio 1997) 8, 23, 36

State v. Wesley,
1986 Ohio App. Lexis 8651
(Ohio Ct. App. Sept. 22, 1986) 13

State v. Xie,
584 N.E.2d 715 (Ohio 1992) 14

Teague v. Lane,
489 U.S. 288 (1989) 45

Tison v. Arizona,
481 U.S. 137 (1987) 24, 27

Tollett v. Henderson,
411 U.S. 258 (1973) 21, 27, 30

Page

United States v. Broce,
488 U.S. 563 (1989).....29, 35

United States v. Dominguez Benitez,
124 S. Ct. 2333 (2004).....45

United States v. O'Dell,
805 F.2d 637 (6th Cir. 1986).....17

United States v. Ruiz,
536 U.S. 622 (2002).....29, 40

United States v. Timmreck,
441 U.S. 780 (1979).....20, 38

In re Washington,
691 N.E.2d 285 (Ohio 1997).....23, 24

Statutes and Rules

28 U.S.C. § 1254(1).....1

Ohio Rev. Code § 2901.22(A).....22

Ohio Rev. Code § 2903.01 22

Ohio Rev. Code § 2903.01(B).....22

Ohio Rev. Code § 2903.01(D).....22, 23, 24

Ohio Rev. Code § 2923.03(A).....7, 17

Ohio Rev. Code § 2923.03(F) 17, 22, 36

Page

Ohio Rev. Code § 2929.03(A).....7

Ohio Rev. Code § 2929.03(D).....7, 12

Ohio Rev. Code § 2929.03(F) 7

Ohio Rev. Code § 2929.04(A).....6

Ohio Rev. Code § 2929.04(A)(3).....7

Ohio Rev. Code § 2929.04(A)(5).....7

Ohio Rev. Code § 2929.04(A)(7).....8

Ohio Rev. Code § 2929.04(B).....7

Ohio Rev. Code § 2929.04(B)(6) 12, 34

Ohio Rev. Code § 2945.06 11

Ohio R. Crim. P. 11(C)(3).....11

Ohio R. Crim. P. 32.1 14

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Pet. App. 1a–58a. The United States District Court's unreported opinion and judgment denying the writ appear at J.A. 9–107. The District Court's order denying Stumpf's motion to alter or amend judgment appears at Pet. App. 92a–103a. The District Court's order granting a certificate of appealability appears at Pet. App. 104a–20a. The Ohio Supreme Court's entry denying jurisdiction of Stumpf's motion for post-conviction relief appears at Pet. App. 235a, the opinion and judgment of the Ohio Fifth District Court of Appeals affirming the denial of Stumpf's motion for post-conviction relief appears at Pet. App. 227a–34a, and the trial court order denying Stumpf's motion for post-conviction relief appears at Pet. App. 237a–41a. The Supreme Court of Ohio's published decision and order on direct appeal appear at Pet. App. 149a–77a. The opinion of the Ohio Fifth District Court of Appeals on direct appeal appears at Pet. App. 180a–214a. The trial court's entry denying Stumpf's motion to withdraw his guilty plea appears at Pet. App. 280a, the trial court's judgment on sentencing appears at Pet. App. 217a–21a, the trial court's order accepting Stumpf's guilty plea appears at Pet. App. 222a–26a, and the trial court's judgment entry finding Stumpf guilty of aggravated murder appears at Pet. App. 215a–16a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 28, 2004. The Sixth Circuit denied the Warden's Petition for Rehearing and Suggestion for Rehearing En Banc on August 9, 2004. The Warden filed a Petition for Writ of Certiorari on November 8, 2004, within 90 days of the Sixth Circuit's denial of rehearing. The Court granted the Petition on January 7, 2005. The Warden invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix included with this brief. Unless otherwise noted, the statutes and rules cited in this brief are the versions that were in effect at the time of Petitioner's offense.

INTRODUCTION

John Stumpf pleaded guilty to the aggravated murder of Mary Jane Stout. Stumpf and his partner, Clyde Wesley, agree that one of them shot Mrs. Stout four times—three times in the head alone—killing her during the course of robbing the Stouts' house. Not surprisingly, though, they disagree about who actually pulled the trigger. Stumpf says Wesley did it, and Wesley says Stumpf did it. That uncertainty, while a central feature of the decision below, is largely, if not entirely, irrelevant to the legal issue this case in fact presents. But the court below combined that factual uncertainty with errant readings of both Ohio law and the Court's decisions to arrive at the remarkable conclusion that Stumpf's conviction, a conviction based on his guilty plea, violated the Constitution in two different ways. In fact, each of its constitutional theories is fatally flawed.

First, in holding that Stumpf's guilty plea was involuntary, the court below used an analytical framework inconsistent with the Court's decisions. On-the-record plea proceedings carry a presumption of regularity. As a corollary, where the defendant admits on the record that his counsel adequately explained the charges to which the defendant is pleading, or even where his counsel says that on the defendant's behalf, the burden falls squarely on the defendant, in his habeas action, to show that no such explanation occurred.

While the court below paid lip service to that proposition, the analysis it actually employed instead placed the burden on the State. In the face of unrebutted record evidence that Stumpf's counsel had provided adequate explanation, it found that the plea must not have been adequately explained. And in reaching that conclusion, it relied on a flawed reading of Ohio law. Essentially, the court reasoned that (1) the only theory the State was pressing regarding Stumpf's guilt of the aggravated murder charge was that he was the actual shooter, (2) Stumpf has always maintained he was not the actual shooter, hence (3) if he pleaded guilty it must be because he did not understand the charges. That reasoning fails, however, for the simple reasons that (1) substantial evidence shows that Stumpf *was* the actual shooter, and (2) in any event, his conviction for aggravated murder could stand even if he was not. That is, even if his partner, Wesley, actually pulled the trigger, Stumpf could still be criminally liable for aggravated murder under Ohio law. Once that misunderstanding is resolved, though, the entire syllogism collapses. Stumpf admitted that he received adequate explanation, and his conduct in pleading guilty was entirely consistent with that explanation having occurred.

Second, the Sixth Circuit's "inconsistent theories" due process holding fares no better. The court found that the State violated due process by using inconsistent theories in obtaining Stumpf's and Wesley's convictions, in particular that the theory in Stumpf's case was that Stumpf was the shooter, and that the theory in Wesley's case was that Wesley was the shooter. But the Sixth Circuit's theory fails both on the facts and the law. In fact, at Wesley's trial, the State argued in closing that Wesley was guilty *either* as the shooter *or* because he participated with Stumpf in the events that led to her death. Stumpf, on the other hand, pleaded guilty, so he never had a "trial" to establish his guilt. Nor does the claim fare any better on the law. The due process claim is, at root,

an attack on Stumpf's guilty plea, and the Court has long recognized that habeas cannot be used to collaterally attack a guilty plea, other than on voluntariness grounds. Even if Stumpf could get around that rule, and he can give no good reason to allow him to do so, no evidence here shows that the State did anything wrong. The prosecutor did not secure Stumpf's plea by concealing evidence, as the evidence about which Stumpf complains did not even exist at the time he pleaded guilty. Rather, Stumpf's complaint must be that, in light of the new evidence, the State was required to permit him to withdraw his plea. But that is merely a sub-species of an "actual innocence" claim (i.e., "the State cannot maintain this conviction because this new evidence shows I am actually innocent"), and as such it fails, both because the Court has long held that actual innocence is not a "freestanding habeas claim," and because the totality of the evidence overwhelmingly precludes Stumpf from establishing actual innocence here.

In short, Stumpf pleaded guilty and, as the dissent below noted, "got exactly the opportunities that he bargained for." The prosecutor dropped two out of the three capital specifications, reducing the likelihood that Stumpf would get a capital sentence, and also dismissed three of the five criminal charges. To be sure, Stumpf ultimately received a death sentence, notwithstanding the deal, but that does not provide him any basis to go back and challenge his plea. The Sixth Circuit was wrong to conclude otherwise.

STATEMENT OF THE CASE AND FACTS

The State of Ohio sentenced Stumpf to death for the role he played in killing Mary Jane Stout, a crime to which he pleaded guilty. This case involves his challenge to that plea.

A. During the course of robbing the Stouts, Stumpf and Wesley shot both Stouts, killing Mary Jane Stout.

On May 14, 1984, just after sundown, John Stumpf and Clyde Daniel Wesley walked up to the Stouts' house in rural eastern Ohio. They knocked on the door and, when Norman Stout answered, asked if they could use the telephone. Stout invited them in and allowed them to use the phone. Several times, while they were inside, Stumpf asked Wesley "Are you ready?" and Wesley replied, "Not yet." But when Stumpf asked again, Wesley said, "Now, yes." Stumpf Hr'g Tr. 305–06 (Factual Basis Hr'g) (Dist. Ct. R. 13).

Stumpf and Wesley then drew their guns and began robbing the Stouts. Stout testified that Stumpf marched Stout and his wife, Mary Jane, into a bedroom at gunpoint. He then held them there while Wesley ransacked the house, looking for items to steal. *Id.* at 310–12. Mr. Stout at some point moved toward Stumpf, and Stumpf admits that he then shot Stout in the head. *Id.* at 310–16; Stumpf Hr'g Tr. 502 (Sentencing Hr'g). The shot did not kill Stout, and, after a brief struggle, Stumpf shot him in the head again. *Id.* at 502.

As Stout lay on the floor grievously wounded, he heard two male voices talking, and then he heard four more gunshots. Stumpf Hr'g Tr. at 317–19 (Factual Basis Hr'g). Investigators later determined that Mrs. Stout was shot four times, and died from three bullet wounds to her head. *Id.* at 86–92. No one disputes that Mrs. Stout was shot and killed during the course of the robbery, although there is a dispute as to whether Stumpf or Wesley fired the shots.

Ballistics examinations confirmed that Mr. Stout and Mrs. Stout were both shot with the same gun, a .25 caliber handgun whose characteristics were consistent with that of a Raven brand firearm. *Id.* at 337–40. Mr. Stout, who was familiar with Raven handguns, recalled that he was shot with a chrome firearm, similar to a Raven .25. Stumpf was

carrying a Raven .25. *Id.* at 316. Wesley, by contrast, was carrying a black Armi .25. *Id.* at 260.

After completing the robbery, Stumpf and Wesley left the Stout house in Mrs. Stout's car with the guns and other items they had stolen, leaving both Stouts for dead. During the trip, Stumpf disposed of the Raven .25 by throwing it out the car's window. Stumpf Hr'g Tr. 503 (Sentencing Hr'g).

When picked up by the police, Stumpf originally denied any knowledge of the crimes. After finding out that Mr. Stout had survived, however, Stumpf changed his story, admitting that he shot Mr. Stout. Although Stumpf admitted to carrying the chrome Raven .25 and to later disposing of it, he wavered on whether he had shot Mr. Stout with this gun or another gun. He claimed to know nothing about Mrs. Stout's shooting, and even claimed that he was not in the house when it occurred. Stumpf Hr'g Tr. at 187–98 (Factual Basis Hr'g).

B. State court proceedings.

1. Stumpf was indicted for aggravated murder and various other crimes involving the Stout slaying.

Based on Stumpf's confession, and the police investigation, a Guernsey Country grand jury issued a five-count indictment against Stumpf for his role in the robbery and shooting at the Stouts' home. In particular, the grand jury charged Stumpf with Mrs. Stout's aggravated murder (Count 1), the attempted aggravated murder of her husband (Count 2), grand theft (Count 3), grand theft—motor vehicles (Count 4), and grand theft—firearm (Count 5). J.A. 117–21.

Of particular importance here, the aggravated murder count (Count 1) also contained "capital specifications." Under Ohio law, a defendant is not automatically eligible for the death penalty simply by being convicted of aggravated murder. Ohio Rev. Code § 2929.04(A). Rather, capital

punishment can be imposed only if the indictment alleges aggravating circumstances, or what Ohio courts refer to as "capital specifications" or "death specifications," in connection with the crime. *Id.*; see also Ohio Rev. Code § 2929.03(A). An indictment may contain multiple capital specifications for a given count. While any one specification can be enough to support a death sentence, each separate specification also remains important. That is because, during the sentencing phase of a capital trial, the factfinder is called upon to weigh aggravating circumstances against mitigating circumstances. Ohio Rev. Code § 2929.03(D) & (F). And it is settled law in Ohio that in conducting that weighing, the factfinder may consider, on the "aggravating side," only the capital specifications contained in the indictment and of which the defendant has been found guilty beyond a reasonable doubt. *Id.* § 2929.04(B); see also *State v. Cooey*, 544 N.E.2d 895, 916–17 (Ohio 1989) (only the aggravating circumstances that apply to the particular aggravated murder count being considered may be weighed against the mitigating factors).

Stump's indictment included three separate capital specifications. First, the indictment charged that the aggravated murder was committed for the purpose of "escaping detection, apprehension, trial, or punishment for another offense," or in other words, that Mrs. Stout was killed because she was a witness to the aggravated robbery (referred to here as the "witness-killing specification"). *Id.* § 2929.04(A)(3); J.A. 117. Second, it alleged that the aggravated murder occurred as "part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, to wit: Mary Jane Stout and Norman Stout" (the "multiple-murder specification"). Ohio Rev. Code § 2929.04(A)(5); J.A. 118. Third, the indictment contained a felony-murder specification. *Id.* Under Ohio law, this latter specification required two elements: (1) that the aggravated murder occur in the course of another felony, and (2) that

either (a) the person charged was the "principal offender" in the killing, or (b) that the killing occurred as a result of "prior calculation and design." Ohio Rev. Code § 2929.04(A)(7). Accordingly, Stumpf's felony-murder specification charged that (1) the aggravated murder occurred while Stumpf "was committing, or attempting to commit, or fleeing immediately after committing . . . the offense of [aggravated robbery], and (2) that Stumpf "was the principal offender in the commission of the offense of [aggravated murder]." J.A. 118.

Importantly, only with regard to the third specification, the felony-murder specification, did it matter whether or not Stumpf was the "principal offender" (i.e., the actual shooter). Under the other two specifications, he could be death-eligible whether he actually pulled the trigger or not. See *State v. Smith*, 684 N.E.2d 668, 691 (Ohio 1997).

The aggravated murder count, as well as the attempted aggravated murder count, also contained a firearm specification. J.A. 118, 119. This specification did not make Stumpf eligible for capital punishment. Rather, if proven, it would enhance his sentence by a mandatory three-year term (for each such specification) that he must serve before beginning any other terms of incarceration.

2. Stumpf pleaded guilty in exchange for the prosecutor's agreement to drop two of the three capital specifications on the aggravated murder charge and the three robbery and theft charges.

Stumpf waived his right to trial by jury and instead chose to be tried before a three-judge panel. Stumpf Voir Dire Tr. 905–07 (Aug. 23, 1984) (Dist. Ct. R. 13). The day the trial was set to begin, the prosecutor and Stumpf's counsel announced that they had reached a plea agreement. Stumpf Hr'g Tr. 5–11 (Plea Hr'g), J.A. 130–35. Stumpf agreed to plead guilty to aggravated murder and attempted aggravated murder, and in exchange, the prosecution dropped

the robbery and theft charges (counts three, four and five). The prosecution further agreed to treat the two separate firearm specifications (on the murder and attempted murder) as arising out of the same transaction for sentencing purposes, meaning that Stumpf would get only one three-year firearm enhancement, as opposed to two, *Id.* at 131–35.

Most important, the prosecution agreed to drop two of the three capital specifications on the aggravated murder charge. In particular, the prosecution dropped the multiple-murder specification, and the felony-murder specification (i.e., the only specification that required the State to prove that Stumpf was the "principal offender"). *Id.* at 132.

As a result of this plea deal, Stumpf remained eligible for the death penalty, a fact that, as described below, he expressly acknowledged. At the same time, however, the prosecutor's agreement to drop two of the three capital specifications limited the nature of the aggravating circumstances that the three-judge panel could consider in its sentencing decision, thereby increasing the likelihood that he would escape a death sentence.

3. During the plea colloquy, Stumpf admitted that his attorneys explained the charges to him.

As part of that plea process, the court engaged in a lengthy colloquy with Stumpf and his attorneys regarding the plea. Because the plea and the events surrounding it are central to the claims here, the plea colloquy is reprinted in its entirety in the joint appendix. J.A. at 128–55. A review of that plea hearing confirms several key points about Stumpf's plea.

First, the record shows that the court expressly asked Stumpf's attorney whether he had explained the elements of the charged crimes to his client:

> [THE COURT]: Have you informed your client of the elements of the offenses with which he is charged,

of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?

[STUMPF'S ATTORNEY]: Yes, we have.

Id. at 135.

Second, Stumpf confirmed that his attorneys had undertaken that explanation:

[THE COURT]: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?

[STUMPF]: Yes, sir.

[THE COURT]: *Do you personally acknowledge that your attorneys have informed and advised you as they say they have?*

[STUMPF]: *Yes, sir.*

[THE COURT]: Are you satisfied with the services which they have performed for you?

[STUMPF]: Yes, sir.

Id. at 137–38. (emphasis added).

Third, Stumpf expressly stated that he understood that, notwithstanding the plea, he could still be sentenced to death:

[THE COURT]: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to . . . a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years *and the death penalty by electrocution could be imposed against you. Do you understand that, sir?*

[STUMPF]: Yes, sir.

Id. at 139 (emphasis added).

The court also informed Stumpf that his sentence would be determined after a mitigation hearing. *Id.* at 140–42. And Stumpf indicated through his attorneys that he would "present evidence . . ..relative to his conduct" at that time. *Id.* at 142.

4. The factual basis hearing corroborated the plea.

Because this was a capital case, Ohio law required a factual basis hearing to corroborate Stumpf's plea. Ohio Rev. Code § 2945.06; Ohio R. Crim. P. 11(C)(3). At that hearing, the prosecution presented ballistics evidence showing that the bullets that wounded Mr. Stout and all of the bullets that hit Mrs. Stout, the murder victim, came from the same gun, and that the bullets came from either a Raven .25 or another gun with "left-hand twist," a characteristic Wesley's Armi .25 did not have. Stumpf Hr'g Tr. 342, 337–47 (Factual Basis Hr'g). The State also presented evidence showing that during the robbery and shooting of Mr. Stout, Stumpf carried, and fired, a Raven .25. *Id.* at 187–98.

In addition, the State presented Mr. Stout's testimony that Stumpf had held him and his wife at gunpoint, and that Stumpf shot him. *Id.* at 316. Mr. Stout also testified that after he had been shot the second time, he heard two male voices talking, followed immediately by four shots. *Id.* at 317–19. Mr. Stout did not see who shot his wife.

When the factual basis hearing ended, Stumpf's attorneys moved for acquittal on the aggravated murder charge and the witness murder specification. The court denied the motion. J.A. 157. Stumpf's lawyers also moved to dismiss the witness murder specification, relying on *Enmund v. Florida*, 458 U.S. 782 (1982). J.A. 160–63. The court also denied that motion. *Id.* at 167. The three-judge panel found

Stumpf guilty of both aggravated murder and the specification, and entered a verdict on that charge and specification as well as on the attempted aggravated murder count. *Id.* at 169–70; Pet. App. 215a.

5. The court sentenced Stumpf to death.

The court then held a mitigation hearing, as required for all capital cases. Ohio Rev. Code § 2929.03(D). At the hearing, Stumpf admitted that he robbed the Stouts' home and that he shot Norman Stout in the head. He claimed, however, that he did not shoot Mrs. Stout. Stumpf Hr'g Tr. 500–03 (Sentencing Hr'g).

After considering all of the evidence presented, the three-judge panel unanimously sentenced Stumpf to death. J.A. 199. The court cited several factors supporting its conclusion that the aggravating circumstance—witness murder—outweighed the mitigating circumstances shown (i.e., Stumpf's relative youth—he was 23—and limited prior criminal record). To be sure, one of the court's considerations was its belief that Stumpf was the actual shooter. That belief led it to reject Stumpf's claim that he was a minor participant in the crime, which is a mitigating factor under Ohio Revised Code § 2929.04(B)(6). Pet. App. 219a. But, in explaining its reasons for finding that the aggravating circumstance outweighed the mitigating factors, the court also pointed to other aspects of the way in which the witness-killing was carried out—how Stumpf and Wesley entered the house and assumed control of the victims in a "methodical manner," as shown by (among other things), Stumpf's continuous holding of the victims at gunpoint, Stumpf's "shooting [Mr. Stout] at close range between the eyes," firing a second shot into Mr. Stout's head, and, Stumpf and Wesley "engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout." Pet. App. 219a–20a. The court also found that Stumpf and his companion failed to help the victims, fled immediately from the scene with the victims' automobile and personal property, including firearms and ammunition, and that Stumpf made no effort to disassociate himself from his companion, and actively participated in selling the guns stolen from the victims' home. *Id.* at 220a–21a.

6. Wesley is convicted at trial.

Seven months after Stumpf's guilty plea and death sentence, Ohio tried Wesley for his role in the Stout slayings. Ohio was unable to try Wesley sooner, as he had fled the State immediately after the crimes, and fought extradition from Texas. *Id.* at 7a.

At Wesley's trial, the prosecution called James Eastman, the person with whom Wesley shared a cell while he was awaiting trial. Eastman testified that Wesley had admitted to Eastman that he (i.e., Wesley) shot Mrs. Stout. It is uncontested that Eastman first heard this supposed admission, and that the State first learned of it, after Stumpf's plea and sentencing. *Id.* at 270a–72a, 275a–76a. Wesley, by contrast, maintained that Stumpf had been the triggerman. Wesley Trial Tr. 2780–88 (Dist. Ct. R. 33).

During the closing statement at Wesley's trial, the State presented two alternative arguments. The State said that either (1) Wesley had been the shooter, or (2) Stumpf had been the shooter and Wesley was criminally complicit. See J.A. 278–85. The jury ultimately convicted Wesley of aggravated murder and the witness-killing specification, but found him not guilty on the felony-murder specification (i.e., the only specification that expressly charged that Wesley was the principal offender). Wesley Trial Tr. 3241–43 (Dist. Ct. R. 41). At sentencing, the jury recommended a life sentence with the possibility of probation after twenty years. *State v. Wesley*, 1986 Ohio App. Lexis 8651, at *1 (Ohio Ct. App. Sept. 22, 1986).

7. Stumpf moved to withdraw his guilty plea.

After Wesley's conviction, Stumpf moved to withdraw his guilty plea. Pet. App. 266a–68a. Under Ohio Rule of Criminal Procedure 32.1, a defendant may move to withdraw his plea after sentencing "to correct a manifest injustice." See *State v. Xie*, 584 N.E.2d 715, 719 (Ohio 1992) (decision to deny pre-sentence motion to withdraw guilty plea is within the sound discretion of the trial court). In his motion, Stumpf made no claim that he had not understood the elements of the offense to which he pleaded guilty. Instead, Stumpf sought to vacate his plea based on the fact that the State had presented evidence at Wesley's trial that it was Wesley, not Stumpf, who shot Mrs. Stout. Pet. App. 266a–68a.

In response, the prosecutor made two arguments why the court should not allow Stumpf to withdraw his plea. He argued that Stumpf was the actual shooter. J.A. 125. But he also argued that such a "finding is unnecessary to imposition of the death penalty." *Id.* Or, in other words, "[e]ven deleting the finding that Stumpf was the principal offender and actually shot Mrs. Stout, the remaining findings of the court amply support the determination that the aggravating circumstances outweigh the mitigating factors." *Id.* at 126.

On October 2, 1985, after reviewing both the jailhouse informant's and Wesley's testimony from Wesley's trial, the trial court denied Stumpf's motion. Pet. App. 277a–80a.

Stumpf filed a supplemental brief in the Fifth District Court of Appeals, raising his claims regarding the motion to withdraw his plea as an additional issue in his pending direct appeal of his conviction. The Fifth District Court of Appeals affirmed both his conviction and the denial of his motion to vacate his guilty plea. *Id.* at 180a–214a. It found that Eastman's statement did not qualify as "newly discovered evidence," and that, in any event "[t]he evidence beyond reasonable doubt shows [that] Stumpf was at least one of [Mrs. Stout's] principal slayers." *Id.* at 204a.

Stumpf then appealed to the Ohio Supreme Court. That court also rejected Stumpf's arguments. *Id.* at 156a–77a. In so doing, the Ohio Supreme Court expressly stated that Stumpf did not "claim that his plea was not entered knowingly, intelligently, and voluntarily." *Id.* at 170a. The Court denied certiorari. *Id.* at 178a–79a.

Stumpf then brought a state post-conviction action further challenging his guilty plea. The state courts again rejected his claims, both in the trial court and on appeal. *Id.* at 227a–41a. The Court again denied certiorari. *Id.* at 236a.

C. Stumpf sought federal habeas relief.

Stumpf then petitioned for a writ of habeas corpus in federal district court. In his Second Claim for Relief, Stumpf asserted that his guilty plea was not knowing, intelligent, and voluntary because he alleged that his attorneys told him that he could not be sentenced to death if he pleaded guilty. The district court rejected this claim on the merits on February 7, 2001. J.A. 32–44. Importantly, Stumpf did not claim that his attorneys had failed to explain the elements of the crimes to him.

In Stumpf's Seventh Claim for Relief, he argued that he should have been granted a new trial because, in his view, the Eastman testimony amounted to later-discovered evidence that Wesley was the actual shooter. Apparently, the district court sua sponte raised the question whether the State's failure to allow Stumpf to withdraw his plea violated his right to due process, insofar as the State prosecuted Stumpf's codefendant based on an "inconsistent theory." The district court ultimately held that Stumpf's due process rights were not violated. J.A. 97–102.

Stumpf then appealed to the Sixth Circuit. There, Stumpf continued to claim that his guilty plea was invalid because (1) he received no benefit from pleading guilty, and (2) his attorney incorrectly told him that he would not be

eligible for the death penalty if he pleaded guilty. *Id.* at 112–16. However, Stumpf conceded in his Sixth Circuit brief that "the record suggests an air of regularity and a valid plea." *Id.* at 109.

The Sixth Circuit, in a 2-1 opinion, granted habeas relief on two independent grounds. First, the Sixth Circuit held that Stumpf's guilty plea was constitutionally involuntary because he did not understand the aggravated murder charge. In particular, the court found that Stumpf's stated desire to put on evidence of his "version of the crime"—that is, his claim that Wesley shot Mrs. Stout—along with "his attorneys' argument that [Stumpf] did not intend, and was not even present for, the killing of Mrs. Stout, should have put the trial court on notice that Stumpf was not aware of the true import of his plea." Pet. App. 28a.

Second, the court concluded that the State had violated Stumpf's right to due process by convicting Wesley on evidence—evidence that came to light after Stumpf's conviction and sentence were entered—that was inconsistent with Stumpf's plea. *Id.* at 48a. In particular, the court pointed to the evidence at Wesley's trial that Wesley was the shooter. This was inconsistent with Stumpf's plea, the Sixth Circuit said, because in Stumpf's case the "prosecution offered virtually no evidence regarding intent other than its contention that Stumpf shot Mrs. Stout." *Id.* at 45a–46a.

The dissenting judge disagreed with both of these conclusions. On the first claim, he disagreed with the panel majority's "extensive exegesis of the 'confusion' at the plea hearing itself." *Id.* at 57a. The dissent concluded that "Stumpf understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted." *Id.* at 58a. With regard to the second (inconsistent theories) claim, the dissent observed that "[h]owever flawed a defendant's guilty plea might be, it

cannot constitute a contradictory prosecutorial theory of guilt as required in [*Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000)]." Pet. App. 54a (Boggs, C.J., dissenting). As the dissent also noted, the record does not show that the prosecutor "was remiss in relying on Stumpf's acknowledgment of guilt." *Id.* at 53a. "At most, the *existence* of [the cellmate's] statement could be argued to have rendered the conviction [of Stumpf] unreliable, but then [the] analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background." *Id.* at 55a–56a (citing *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986); *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). As the dissenting judge noted, "[i]t would indeed be bizarre if [the cellmate's] statement could not undermine Stumpf's conviction by its own force, but introducing it into another proceeding could do so." Pet. App. 55a–56a. The Sixth Circuit denied a petition for rehearing and rehearing en banc. J.A. 8.

This appeal followed.

SUMMARY OF ARGUMENT

The Sixth Circuit granted Stumpf habeas relief on two separate grounds. Its reasoning on each was flawed.

1. Stumpf's plea was knowing and voluntary. The Sixth Circuit's contrary conclusion is wrong for at least two reasons. First, the Sixth Circuit's reasoning assumed that the State's theory of guilt in Stumpf's case—that Stumpf fatally shot Mrs. Stout—was the only basis on which the State could convict Stumpf of aggravated murder. But that is not the case. Under Ohio law, an accomplice who acts with the intent required for an underlying crime can be liable as a principal. Ohio Rev. Code § 2923.03(A) & (F). And contrary to the Sixth Circuit's view, a finding that the defendant "specifically . . . intended to cause the death of another" requires only that the defendant entered into a common

design with others to commit a felony, and either knew that an inherently dangerous instrumentality would be used, or that the manner of the felony was reasonably likely to produce death. Stumpf's participation in the events at the Stouts' home, including that he undisputedly shot Mr. Stout, easily satisfies this standard, even if he was not the one who fatally shot Mrs. Stout. So there was no basis to infer from his insistence that he did not shoot Mrs. Stout that he could not have understood the intent element required for aggravated murder. Thus, Stumpf's insistence that he was not the shooter is consistent with his guilty plea to aggravated murder.

Second, the Sixth Circuit's approach gave insufficient weight to Stumpf's and his counsel's representations on the record that counsel advised Stumpf about the elements of the offense. Under *Henderson v. Morgan*, 426 U.S. 637 (1976) ("*Henderson*"), those representations easily satisfy the State's obligation to point to a basis in the record supporting the voluntariness of the plea. Here, the record indicates the regularity of the plea hearing, so that should suffice to show voluntariness. Stumpf can overcome that only by presenting compelling, extrinsic evidence of involuntariness, or, at a minimum, a record showing that no reasonable defendant who was properly advised by counsel would have pleaded guilty. In this case, the ballistics evidence showed that the gun that killed Mrs. Stout was the same one that wounded Mr. Stout, and Stumpf admitted that he shot Mr. Stout twice. Mr. Stout lived through his shooting, and was available to testify against Stumpf. Faced with the evidence that Stumpf knew was available to the prosecution, Stumpf's decision to plead guilty to reduced charges and specifications, which reduced the possibility that he would receive the death penalty, was a reasonable choice, and does not undercut the voluntariness of his plea.

2. The Sixth Circuit's "inconsistent prosecution" due process theory was equally flawed. According to the court

below, Stumpf's plea violated due process because the State subsequently prosecuted Wesley, Stumpf's co-defendant, based on the "inconsistent theory" that Wesley shot Mrs. Stout. Pet. App. 48a. But that holding is wrong for several reasons.

First, it is wrong as a matter of fact, as the evidence that the State presented in Wesley's trial was entirely consistent with Stumpf's guilt on the aggravated murder charge.

Beyond that, the theory also fails as a matter of law. To the extent that this due process claim is merely a repackaged "involuntary plea" claim, it fails for the reasons discussed above. On the other hand, to the extent Stumpf's due process claim is an attack on his guilty plea that does not rest on "involuntariness," it runs headlong into the "well settled [rule] that a voluntary and intelligent plea of guilty by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

Moreover, even if Stumpf could collaterally attack his guilty plea, he has no due process claim here. If the claim is that it was prosecutorial misconduct to make the plea offer, or that the court somehow violated due process in accepting it, the argument fails because, even under Stumpf's account, the plea was perfectly acceptable when made. Stumpf complains only about the later use of newly-discovered evidence at Wesley's trial, evidence not available when Stumpf pleaded guilty. Such later-discovered evidence cannot demonstrate prosecutorial bad faith in plea dealings that occurred before the evidence was found.

Thus, Stumpf's claim must in fact be that the State violated due process when it did not allow him to withdraw his guilty plea in light of the "new evidence." But this argument fails for two reasons. To the extent this is a procedural due process claim (i.e., that the State deprived Stumpf of his right to withdraw a guilty plea without

adequate process), it fails for the simple reason that the State *did* provide sufficient process. Stumpf filed a motion to withdraw his plea in the trial court. Pet. App. 266a–68a. He then litigated that issue in the trial court, Ohio's intermediate appellate court, and the Ohio Supreme Court. And all of these courts considered the withdrawal claim on the merits. They just concluded the Stumpf had not made a valid claim. Thus, he received sufficient process.

If his claim, by contrast, is some form of substantive due process claim (i.e., "the new evidence shows I am actually innocent, and it violates substantive due process to refuse to allow an actually innocent person to withdraw his plea"), it also fails. Having pleaded guilty in state court, Stumpf cannot now use "new evidence" to relitigate his innocence in federal habeas. And even if he could, the new evidence here does not demonstrate that Stumpf was "actually innocent."

In finding a due process violation on these facts, the Sixth Circuit decision conflicts with the well-established precedent from the Court governing claims of prosecutorial misconduct and actual innocence. And in creating this newly minted due process right, the decision below poses a serious threat to the finality of guilty pleas. For as the Court has observed, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (footnote omitted). Accordingly, the Sixth Circuit's judgment should be reversed.

ARGUMENT

A. Stumpf's guilty plea was voluntary and intelligent.

Stumpf's guilty plea was voluntary and intelligent, consistent with *Henderson v. Morgan*, 426 U.S. 637 (1976), for two reasons. First, contrary to the Sixth Circuit's

reasoning, Stumpf's insistence that he was not the actual shooter is consistent with his guilty plea to aggravated murder. Accordingly, his protest that he was not the one who fatally shot Mary Jane Stout cannot serve as a basis to infer—despite a regular plea hearing record—that Stumpf did not understand the intent-to-kill element of the offense. Second, the plea hearing record confirms that Stumpf's attorneys explained the elements of the offense to him. Under *Henderson*, that is enough to show that the guilty plea was voluntarily and intelligently made. *Id.* at 647.

The Sixth Circuit's contrary ruling reverses the presumption in *Henderson* that a defendant's lawyer has explained the nature of the offense to his client; it effectively requires a trial judge taking a plea to assume that a represented defendant has *not* been adequately counseled. The Sixth Circuit's ruling is contrary not only to *Henderson*, but conflicts with the Court's recognition that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged . . . he may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson*, 397 U.S. 759 (1970)]." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("*Tollett*"). Stumpf has never made that showing. And the State's strong evidence against Stumpf further confirms that his decision to plead guilty to reduced charges and capital specifications was reasonable, and wholly consistent with his having been properly advised. Accordingly, the ruling below that his plea was involuntary is in error.

1. Stumpf's insistence that he was not the triggerman is consistent with his guilty plea to the aggravated murder of Mrs. Stout.

The Sixth Circuit's ruling is premised on the view that, notwithstanding Stumpf's and his counsel's affirmation on

the record that counsel advised Stumpf of the elements of the crime, Stumpf nevertheless could not have understood the "specific intent" element of the aggravated murder offense because he insisted that he was not the triggerman. See Pet. App. 29a. But the Sixth Circuit's premise rests upon a faulty understanding of what Ohio law requires to show "specific intent" to kill.

Under Ohio law, the State can meet the specific intent element of aggravated murder even where the defendant was merely an accomplice, and did not actually pull the trigger. An indictment on the principal charge also permits conviction as an accomplice. Ohio Rev. Code § 2923.03(F) ("A charge of complicity may be stated in terms of this section, or in terms of the principal offense."). To be sure, Ohio's aggravated murder statute, *id.* § 2903.01,[1] makes specific intent a necessary element of the crime:

> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another . . . .

But, under that statute, a jury may, after considering all of the evidence, infer specific intent to kill based solely on the defendant's participation in an underlying felony so long as certain conditions are met. In particular, the State must show that the defendant engaged in a common design with others to commit the offense by force and violence, and either that

[1] The aggravated murder statute was later amended to remove former Ohio Revised Code § 2903.01(D), leaving in place the existing requirement that the aggravated murder be done with the *mens rea* of "purpose," the highest mens rea in Ohio law. *Id.* § 2903.01(B) (1998); see also *id.* § 2901.22(A) ("A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."). The amended aggravated murder statute is not at issue in this case.

the defendant knew that an inherently dangerous instrumentality was to be employed to accomplish the felony, *or* that "the felony and the manner of its accomplishment would be reasonably likely to produce death." *State v. Scott*, 400 N.E.2d 375, 382 (Ohio 1980) (describing evidence sufficient to show intent to kill under prior statute); see also *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1997) (applying *Scott* regarding sufficient proof of intent to kill, to showing required under former Ohio Revised Code § 2903.01(D)). Based on that showing, the jury may, but is not required to, find specific intent.

In a case directly on point, *In re Washington*, the Ohio Supreme Court held that when "the prosecution seeks to prove intent to kill by establishing the defendant's participation in planning and executing a robbery, the factfinder may infer the defendant's intent to kill and may base its finding of intent to kill *solely on that inference*." 691 N.E.2d at 287 (emphasis added). Consistent with the above explanation of Ohio Revised Code § 2903.01(D), the court further reasoned that although "the state has produced sufficient evidence to permit the factfinder to draw the inference [it] does not *mandate* a finding that the defendant possessed a specific intent to kill"; rather, "the factfinder remains bound to consider all evidence of the defendant's intent to kill." *Id.* (emphasis added); see also *Scott*, 400 N.E.2d at 382 (defendant knew that his accomplices carried guns when kidnapping the victim); *State v. Ballew*, 667 N.E.2d 369, 376–77 (Ohio 1996) (defendant carried a handgun and assembled an armed group to kidnap the victim; circumstantial evidence sufficient to support finding of specific intent to kill even if Ballew's partner fired the shots); *State v. Smith*, 684 N.E.2d 668, 691 (Ohio 1997) (defendant's accomplice killed a victim in accordance with the robbery plan). In sum, Ohio Revised Code § 2903.01(D) amounts to this: a factfinder cannot be told that it *must* find that the defendant specifically intended the victim's death

because the defendant participated in the underlying felony, but such a finding certainly is permissible.[2]

The Sixth Circuit holding, by contrast, reflects a belief that the fact of whether or not Stumpf was the actual shooter is crucial in determining his criminal liability for aggravated murder. In support of its reasoning, however, the court inexplicably relied on *In re Washington*, a case, as explained above, that *affirmed* the conviction of a defendant who was not the triggerman and expressly stated that a jury may infer specific intent from participation in the felony. True enough, the *Washington* court recognized that a factfinder must consider all of the evidence in making its specific intent decision, but that only restates the Ohio Revised Code § 2903.01(D) rule that says the specific-intent inference is not conclusive. A requirement that the factfinder consider any other evidence is miles away from the Sixth Circuit's requirement that the prosecutor *must* produce additional evidence supporting a specific intent finding. The Sixth Circuit's reading of *Washington*, consequently, is an implausible one, and refutes rather than supports its conclusion.

Perhaps recognizing this flaw, the Sixth Circuit attempted to buttress its holding through its observation that "the prosecution presented no evidence that Stumpf intended Mrs. Stout's death, other than arguing that he was the actual shooter." Pet. App. 29a. That is not so. Without question, the prosecutor sought to prove that Stumpf actually shot Mary

[2] Nor does it violate the U.S. Constitution to impose capital punishment on defendants who did not actually kill. In *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987), the Court expressly held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."

Jane Stout. But in arguing that point, the prosecutor identified numerous other facts—most of which Stumpf cannot refute—that provided the sort of circumstantial proof courts have long relied on to prove a defendant's state of mind. Stumpf admitted that he shot Norman Stout twice in the head during the course of the same robbery in which Mrs. Stout was killed. Indeed, when he was first apprehended, he assumed Mr. Stout was dead, until he learned otherwise. It would be surprising, and perhaps inconceivable, that Stumpf, believing he killed Mr. Stout, would have objected to killing Mrs. Stout, when she was a witness both to the robbery and to Stumpf's killing her husband. Thus, Stumpf surely had an intent to kill Mrs. Stout, regardless of who actually pulled the trigger. Additionally, Stumpf and Wesley left the Stouts for dead, and stole the Stouts' car and items of personal property. While driving away from the Stouts' house, Stumpf admittedly disposed of the .25 Raven by throwing it out of the car window. Later, Stumpf and Wesley wiped the Stouts' car clean of fingerprints and abandoned it.

Stumpf's active participation in the planning and execution of the armed robbery here provides ample support in the record for a finding of specific intent. Only by ignoring these facts could the Sixth Circuit come to the conclusion that "there was no other evidence in the record to satisfy [the specific intent] element." Pet. App. 29a. Therefore, the facts, in addition to the law, indicate that the prosecutor's evidence could support a finding that Stumpf specifically intended Mary Jane Stout's death, whether he was the actual shooter or not.

Accordingly, Stumpf's insistence that he was not the one who fatally shot Mrs. Stout was factually and legally consistent with his guilty plea to her aggravated murder. On the facts that the prosecutor presented at the time of the plea, Stumpf could be found to have specifically intended to cause Mrs. Stout's death, and accordingly convicted for aggravated murder under Ohio law, even if he was not the triggerman

who in fact fired the fatal shots. Thus, there is no basis for the Sixth Circuit panel's inference that Stumpf must not have understood that "specific intent" was a required element of the offense. Pet. App. 31a. The Sixth Circuit's inference cannot stand in the face of defense counsel's, and Stumpf's, representations on the record that defense counsel explained the elements of the offense to Stumpf. Cf. *Henderson*, 426 U.S. at 647.

Further belying the Sixth Circuit's assessment that Stumpf must not have known what he was doing, Pet. App. at 31a, Stumpf received a real benefit from his guilty plea. He removed two of the three aggravating circumstances from the charge against him, thereby reducing his chance of being sentenced to death. See *State v. Cooey*, 544 N.E.2d at 916–17 (only the aggravating circumstances that apply to the particular aggravated murder count being considered, and of which a defendant is found guilty beyond a reasonable doubt, may be weighed against the mitigating factors); see also *State v. Green*, 738 N.E.2d 1208, 1222–23 (Ohio 2000) (sentencing errors included weighing aggravating circumstance not alleged in the indictment). In considering whether a death sentence was appropriate, the trial court could weigh only the first (i.e., remaining) specification, not the two that had been dropped. And by eliminating the other three charges (aggravated robbery, "grand theft—motor vehicles" and "grand theft—firearm"), Stumpf also reduced the potential jail time he would serve. The Sixth Circuit misapprehended the potential benefit Stumpf stood to receive from a guilty plea to reduced charges and specifications.

The State's evidence against Stumpf was considerable when he entered his guilty plea. He admitted to participation in the robbery, to holding the victims at gunpoint, and to shooting Mr. Stout in the head at close range. The ballistics evidence established that the bullets that killed Mrs. Stout were from the same gun that shot Mr. Stout, and were consistent with a .25 Raven. Stumpf admitted to having the

chrome Raven when he entered the house and held the Stouts at gunpoint, and he admitted that he had that gun, and disposed of it, after he and Wesley left the Stouts' house.

The evidence at the time of Stumpf's plea pointed to Stumpf not only as a major participant in the crimes at the Stouts' house, and one who acted at least with "reckless disregard for human life," *Tison v. Arizona*, 481 U.S. at 157, but also as the triggerman whose bullets killed Mrs. Stout. Accordingly, Stumpf's choice to plead guilty to reduced charges was entirely rational, as the dissenting judge below observed, Pet. App. 57a–58a, and does not support an inference that he must not have understood the specific intent element of the aggravated murder charge, see *Tollett*, 411 U.S. at 268 ("[T]he expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well support the advisability of a guilty plea.").

The Sixth Circuit misunderstood Ohio's specific intent requirement for aggravated murder and misapprehended the benefit to Stumpf from pleading guilty to reduced specifications and charges. On that basis, the Sixth Circuit incorrectly inferred that Stumpf was not advised of or did not understand the elements of the charge. The Sixth Circuit's decision not only was flawed in this respect, but, as described below, it fails to give the proper weight to Stumpf's and his counsel's on-the-record representations that Stumpf's counsel explained the offense to him. Accordingly, the Sixth Circuit's judgment vacating Stumpf's plea as involuntary, and thus also vacating his conviction, should be reversed.

2. Stumpf's plea was voluntary and intelligent under *Henderson v. Morgan*, as the record confirms that Stumpf's attorneys explained the elements of the charged offenses to him.

Contrary to the Sixth Circuit's conclusion, the record of Stumpf's 1984 guilty plea hearing shows that his plea was

knowing and voluntary, consistent with *Henderson*. The state trial record confirms that:

- Stumpf was represented by counsel in the plea negotiations and hearing, J.A. 135, 138;
- Stumpf's defense counsel stated on the record that he informed Stumpf of the elements of the charged offenses, *id.* at 135;
- Stumpf acknowledged on the record that his counsel had so advised him, *id.* at 137–38;
- Stumpf acknowledged on the record that the plea agreement was as the prosecutor stated, *id.* at 133;
- Stumpf initialed the amended indictment to which he was pleading guilty, *id.* at 135;
- Stumpf acknowledged on the record that he understood he could still receive the death penalty, *id.* at 139;
- Stumpf acknowledged that no promises had been made, other than the plea agreement recited in court, to induce his plea, *id.* at 142 and
- Stumpf stated on the record that he was in fact guilty of the charge in Count One with the first specification—i.e., aggravated murder of a witness to escape detection and punishment, *id.* at 142, 145.

Moreover, Stumpf never claimed that his guilty plea was rendered involuntary by his attorney's failure to explain the elements of aggravated murder. See Pet. App. 12a ("Stumpf does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime."). Therefore, contrary to the Sixth

Circuit's reasoning, *Henderson* here leads to the conclusion that Stumpf received "adequate notice of the offense to which he pleaded guilty," 426 U.S. at 647, before his plea.

A guilty plea "is the defendant's consent that judgment of conviction may be entered without a trial," and, thus, "not only must be voluntary," but also knowing and intelligent, "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to trial by jury, and the Sixth Amendment right to confront one's accusers). "[B]ut [the Constitution] permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor," including the failure of counsel to point out a potential defense. *United States v. Ruiz*, 536 U.S. 622, 630–31 (2002) (citing *United States v. Broce*, 488 U.S. 563, 572–73 (1989) (guilty plea not rendered constitutionally invalid because defendants were unaware that by pleading guilty to the indictment, they were forgoing defense that they were improperly sentenced for two crimes instead of one)).

In *Henderson*, *supra*, the Court held that the defendant's guilty plea to a lesser-included offense not charged in the indictment was involuntary under the Fifth Amendment. The Court's decision, by its own terms, was limited to the "unique" facts of the case. *Henderson*, 426 U.S. at 647. The facts there were "unique" because the habeas petitioner presented evidence *from his state court attorneys* that they "did not explain the required element of intent." *Id.* at 642. Contrasting the facts before it from the usual case, the Court pointedly observed, "*[n]ormally, the record contains* either an explanation of the charge by the trial judge, or at least *a representation by defense counsel that the nature of the offense has been explained to the*

accused." *Id.* (emphasis added). The Court added, "even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.* at 647; accord *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983) ("Under *Henderson*, [a defendant] must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted.").

Under the "normal" circumstance contemplated by *Henderson*, then, defense counsel's representation on the record that he explained the elements of the offense to the defendant, especially where the defendant also acknowledges that his attorney so advised him, should be the end of the matter. *Henderson* simply requires that there must be some basis from the record of the trial court proceedings to conclude that the defendant was made aware of the elements of the offense, either by the court, by defense counsel, or through the court proceedings themselves. Thus, to conclude that a plea is voluntary, it is enough that defense counsel or the defendant represents to the court that counsel has advised the defendant of the nature of the charge and the constitutional protections waived by a plea. As a constitutional matter, a trial judge at a plea colloquy need not recite the elements of the offense to the accused, cf. *Henderson*, 426 U.S. at 647 n.18, or quiz defense counsel about the legal advice she has given her client.

Where the trial court's record of the plea hearing is regular on its face, as it was here, *Henderson* implies that the burden falls on the defendant to show by competent, compelling extrinsic evidence that despite that record, he was not advised of the elements of the offense to which he pleaded guilty. See *Tollett*, 411 U.S. at 267 ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged . . .

he may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*."). Absent such extrinsic evidence, a represented defendant claiming insufficient explanation must show, at a minimum, that no reasonable defendant would have pleaded guilty.

Here, the plea colloquy shows that Stumpf's plea was voluntary under *Henderson*. During a detailed, on-the-record inquiry, Stumpf's attorney specifically represented that Stumpf had been informed of the elements of the charged offenses, and Stumpf acknowledged that his attorneys had informed him of the charges. J.A. 125, 137–38. Stumpf responded "yes" when asked if he was in fact guilty of the aggravated murder count and the capital specification. *Id.* at 142, 145. Stumpf and his attorney also participated in amending the indictment during the plea hearing, with Stumpf himself initialing the changes to the indictment at counsel table "with the advice and assistance of counsel." *Id.* at 133, 135. On-the-record representations like Stumpf's and his counsel's are a far cry from the "silent record" that the Court found insufficient to uphold the plea in *Boykin*, 395 U.S. at 242.

In the face of these on-the-record statements, Stumpf cannot make the necessary showings under *Henderson* to overcome the presumption. Stumpf here presented *no* competent extrinsic evidence, let alone compelling extrinsic evidence, that his plea was based on an inadequate explanation of the elements.[3] See J.A. 43–44 (D. Ct. Op.) ("The only evidence that petitioner has introduced to challenge the validity of his pleas . . . is his own affidavit, first submitted to the trial court as an exhibit to his postconviction action."). For example, Stumpf's 1988

[3] That is perhaps not surprising, given that Stumpf never explicitly claimed that his guilty plea was invalid owing to a lack of explanation by his counsel regarding the elements. Pet. App. 12a.

affidavit claims that he "did not understand the nature of the charges to which [he] was pleading." J.A. 302. Even that affidavit does not state that his attorneys did not explain the elements of aggravated murder to him. In any case, a court applying *Henderson* veers "wide of the mark" by relying solely on the defendant's (after-the-fact) testimony and by requiring the State to produce contrary evidence. *Marshall*, 459 U.S. at 434. Other than counsel's affirmation at the plea hearing that they *had* advised Stumpf of the elements of the offense, the only other competent evidence regarding Stumpf's trial attorneys' advice about the charge appears in the transcript of the hearing on Stumpf's motion to withdraw his plea. Stumpf's counsel, Mr. Tingle, told the court that he had spent "a substantial number" of hours discussing the case and the plea with Stumpf before Stumpf pleaded guilty. J.A. 207. Stumpf has not shown by any competent extrinsic evidence—much less compelling evidence—that his plea was involuntary and unintelligent because his lawyers failed to properly advise him of the elements of the offense.

Nor could the Sixth Circuit have legitimately concluded that no reasonable defendant who was properly advised by counsel would have pleaded guilty to the aggravated murder charge and specification. Indeed, Stumpf's behavior was entirely consistent with adequate explanation. As noted above, see 24–26, there was abundant evidence to support a conviction. And the plea deal, by dropping two of the three specifications, provided Stumpf his best chance to avoid the death penalty. Under these circumstances, Stumpf has failed to show that he did not receive "notice of the offense to which he pleaded guilty." *Henderson*, 426 U.S. at 647.

And perhaps most telling on this point, Stumpf never challenged his guilty plea on the grounds that his attorneys did not adequately inform him of the elements of the charged crimes. On direct appeal, the Supreme Court of Ohio found that Stumpf did not challenge the voluntariness of his pleas at all. Pet. App. 170a. And, in State post-conviction review,

Stumpf claimed that his attorneys erroneously induced him to plead guilty by assuring him that he would not receive the death penalty. *Id.* at 231a–32a, 31a–32a. Indeed, the Sixth Circuit acknowledged that Stumpf "does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime." *Id.* at 12a.[4]

To be sure, the specific theory that the State presented at the factual basis hearing was that Stumpf was the triggerman, Pet. App. 29a, but the specific theory presented is irrelevant. After all, Stumpf pleaded guilty to, and was convicted of, a *crime*, not a *theory*. And, as discussed above, at 24–26, the State's considerable evidence of Stumpf's involvement in the crimes at the Stouts' residence supported a finding of guilt on the aggravated murder charge, even if Stumpf was not the triggerman. Certainly, a rational trier of fact could have found the essential elements of aggravated murder beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (on review for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Faced with the evidence that he knew was available to the prosecutor, it was rational for Stumpf to have pleaded guilty to a charge with reduced capital specifications to lessen his chance of

---

[4] In his federal court habeas petition, one of the reasons Stumpf claimed that his appellate counsel was ineffective was that he did not raise as error that the trial court failed to explain the charge to Stumpf.when he pleaded guilty. See J.A. 75. But even in his federal habeas petition, Stumpf did not claim that his trial counsel did not inform him of the elements of the offense. The district court concluded that counsel was not ineffective for failing to raise this argument on appeal, as the Ohio rule does not require the trial court to explicitly inform the defendant of each element of the offense, and both defense counsel and Stumpf told the trial court that defense counsel had explained the elements of the offense to Stumpf. J.A. 82–88.

receiving a death sentence. Stumpf's disagreement with the State's version of the facts does not necessarily mean that he did not know what the State alleged and the elements of the charge to which he was pleading guilty.

The interjection by Stumpf's counsel that Stumpf wished to present evidence "relative to his conduct," J.A. 142, similarly does not show a lack of explanation. It merely shows that Stumpf wished to argue to the sentencing panel that he was not the actual shooter (or "principal offender"), in hopes of persuading the judges that his (lesser) degree of participation "in the acts that led to the death of the victim," Ohio Rev. Code § 2929.04(B)(6), was a mitigating factor that should be weighed in his favor against imposition of the death penalty. The sentencing panel did not accept Stumpf's view of his role in the offense, Pet. App. 217a–21a, but that does not undercut the reasonableness of Stumpf's and his counsel's strategy in presenting it.

As the dissenting judge observed below, Stumpf sought to obtain the benefits of pleading guilty—the dismissal of additional aggravating circumstances—while reserving his opportunity to contest the State's version of the facts and argue for leniency in sentencing. Pet. App. 56a–58a (Boggs, C.J., dissenting). The result of the defense trial strategy here, as the dissenting Sixth Circuit judge noted, appeared to be "neither a surprise nor a disappointment, in the beginning, to the defendant or his counsel." *Id.* at 57a. Stumpf did not object to the course of the sentencing hearing, nor did he attempt to withdraw his plea at that point. *Id.*

Admittedly, evidence later discovered may have led Stumpf to the conclusion that he would have had a better chance at trial than he thought (assuming the evidence had actually come into existence in time for him to use it). But, as the Court long ago held, a "defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the

quality of the State's case or the likely penalties attached to alternative courses of action." *Brady*, 397 U.S. at 757; *Broce*, 488 U.S. at 572–73.

The Sixth Circuit's decision effectively reverses the presumption in *Henderson* that counsel has sufficiently explained the nature of the offense to the defendant, and instead requires a trial judge taking a plea to presume *inadequate* counseling. But *Henderson* does not support that result, and the cost of the Sixth Circuit's approach to the administration of justice and the finality of convictions entered on guilty pleas is substantial. In sum, the record demonstrates that Stumpf's plea was knowing and voluntary for the purposes of *Henderson*, and the Sixth Circuit's contrary decision should be reversed.

B. The Sixth Circuit's "inconsistent prosecution" theory fails on both the facts and the law.

The Sixth Circuit's theory based on the prosecution's alleged use of "inconsistent theories" was also flawed, both on the facts and the law. First, as a matter of fact, the prosecution did not present "inconsistent theories." Second, as a matter of law, even if it had, Stumpf would not be constitutionally entitled to relief from his guilty plea where, as here, the evidence overwhelmingly precludes him from demonstrating that he was "actually innocent" of the aggravated murder charge. Accordingly, the Sixth Circuit's judgment should be reversed.

1. The theory at Wesley's trial was not "inconsistent" with Stumpf's plea.

Even if Stumpf's "inconsistent theories" claim worked as a matter of law (and as described below, it does not), it fails on the facts, for the simple reason that the theory advanced at Wesley's trial was not inconsistent with Stumpf's guilty plea. The Sixth Circuit opined that the evidence from Wesley's trial suggesting that it was Wesley,

rather than Stumpf, who shot Mrs. Stout was necessarily inconsistent with Stumpf's plea. But there are two flaws with that view. First, the crimes to which Stumpf pleaded guilty did *not* require the State to prove that he actually shot Mrs. Stout, so even if the State's theory at Wesley's trial was that Wesley was the shooter, it would not be inconsistent with Stumpf's plea. Second, the prosecutor's closing argument at Wesley's trial expressly left open the possibility that Stumpf, not Wesley, was the shooter. Thus, in the two proceedings, the State was contending that both were guilty of aggravated murder, a charge wholly supported by the record.

The prosecutor charged Stumpf with aggravated murder, and the indictment included three aggravating factors: (1) murder to escape detection (the witness-killing specification), (2) killing or attempting to kill two or more people (the multiple-murder specification), and (3) committing a murder during the course of a robbery (the felony-murder specification). Each of these three aggravating factors made this a death penalty case in Ohio. But, as described above, see 9 and 22–26, neither the crime of aggravated murder itself, nor two of the three capital specifications, would have required the State to show that Stumpf was the actual shooter. And the prosecution *dropped* the only specification that would have required that showing—the felony-murder specification—as part of the plea deal. That is, the State dropped the only specification that turned on whether Stumpf was the actual shooter.

Accordingly, Stumpf could have been found guilty at trial on the aggravated murder charge (and the attendant witness-killing specification), even if he participated in Mrs. Stout's murder *solely* as an aider and abettor. Ohio Rev. Code § 2923.03(F) ("A charge of complicity may be stated in terms of this section, or in terms of the principal offense."); *State v. Smith*, 684 N.E.2d 668, 691 (Ohio 1997) (for specifications of killing a witness and multiple-murders, the State did not need to prove that the defendant was the actual

killer of one of the victims where the jury reasonably could find that defendant's brother killed the victim in accordance with their agreed plan, and the defendant kicked her in the head to make sure she was dead). And the record, as noted above, contains overwhelming evidence of Stumpf's active participation in the events that led to Mrs. Stout's death. Thus, Stumpf's plea of guilty to aggravated murder is not inconsistent with evidence subsequently discovered, and presented at Wesley's trial, that Stumpf's partner may have fired the fatal shots. Indeed, in opposing Stumpf's attempt to withdraw his plea, the prosecutor made that precise point, arguing that Stumpf's plea could stand whether he was the actual shooter or not. J.A. 124–26.

Nor is it fair to say that the State's theory at Wesley's trial was only that Wesley was the shooter. To be sure, at Wesley's trial, the prosecutor called James Eastman, Wesley's pre-trial cellmate. And Eastman did testify that Wesley admitted to shooting Mrs. Stout. But, in closing, the prosecutor, recognizing that the jury may not find a jailhouse informant to be credible, expressly argued that Wesley was guilty *either* as the shooter *or* because of his criminal complicity in Stumpf's actions. That argument is not necessarily inconsistent, in any way, with Stumpf's plea.

2. Stumpf cannot use federal habeas to collaterally attack his guilty plea.

Stumpf's attempt to attack his conviction on due process grounds also fails on the law. At root, the claim is a collateral attack on his guilty plea. But as the Court has noted, "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). Rather, "[i]t is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired." *Id.* at 508–09. This principle rests on concerns for finality,

concerns that take on "special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979). Accordingly, a defendant seeking to attack his guilty plea, assuming that the plea was knowing and voluntary, must show either that it was "induced by threats . . . misrepresentation . . . or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes)." *Brady v. United States*, 397 U.S. 742, 755 (1970) (quotation marks omitted).

So, for example, in *Mabry*, the prosecutor made a plea offer, and then withdrew it *after* the defendant accepted. The defendant later accepted a new plea offer, but then claimed in habeas, much like Stumpf here, that the prosecutor had engaged in misconduct in connection with the plea. In particular, he claimed that the prosecutor violated due process by rescinding the earlier offer after acceptance. 467 U.S. at 509–11. The Fifth Circuit granted habeas relief. But the Court overruled that holding, finding that "only when it develops that the defendant was not fairly apprised of [a plea's] consequences can his plea be challenged under the Due Process Clause." *Id.* According to the Court:

> The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. Here respondent was not deprived of his liberty in any fundamentally unfair way. Respondent was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now.

Id. at 511 (footnote omitted).

Stumpf, of course, attacks the voluntariness of his plea also. But that attack fails for all of the reasons discussed above in Part A. The point of *Mabry* and these other cases, though, is that if the plea is voluntary, a petitioner cannot use

habeas to mount *other* attacks on the prosecutor's conduct in connection with the plea except in very limited circumstances—circumstances not present here. Stumpf has never even alleged that the State "threatened" him, or made "misrepresentations" or "improper promises." See *Brady*, 397 U.S. at 755. Accordingly, he cannot attack his plea, or the conviction that rests on it, through a federal court habeas petition, as it is "not unfair to expect him to live with" the consequences of his plea deal. Or, as Chief Judge Boggs put it in dissent below, Stumpf "got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted." Pet. App. 58a.

3. The Sixth Circuit's decision conflicts with well-established precedent governing claims of prosecutorial misconduct and actual innocence.

Even if Stumpf could escape the general rule barring collateral due process attacks on guilty pleas, he has no viable due process claim here.

1. To the extent his claim attacks the prosecutor's conduct in offering the plea or acquiescing in Stumpf's acceptance of it, the attack fails, as none of the evidence to which Stumpf points was available at the time that Stumpf made his plea. That is, Stumpf's plea, even under his theory, did not result in a due process violation at the time he made it. And there is no reason to believe that a plea, valid when made, can somehow later evolve into a due process problem. Yet, that is exactly what the Sixth Circuit held here. Without citing any decisions by the Court, the Sixth Circuit stated that "Stumpf clearly has a due process claim even though Eastman's testimony [the allegedly inconsistent evidence implicating Wesley as the "actual killer"] was not available at the time of his trial." Pet. App. 39a. The lower court erred in that conclusion.

The Court has recognized two grounds for relief under the Due Process Clause involving claims related directly to the issue of a defendant's factual guilt or innocence: the withholding of exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), and the knowing presentation of perjured testimony or false evidence, *Giglio v. United States*, 405 U.S. 150 (1972). It has left the door open for a third ground: actual innocence. *Herrera v. Collins*, 506 U.S. 390 (1993). The due process ground for relief discovered by the Sixth Circuit conflicts with the Court's decisions governing these recognized grounds for relief.

Because the allegedly "inconsistent" evidence did not exist at the time of Stumpf's trial, the prosecutor did not violate *Brady*, *supra*. Moreover, the Court has suggested that *Brady* is only a trial right, and thus could well not even apply where a defendant pleads guilty without a trial. *United States v. Ruiz*, 536 U.S. 622, 631 (2002). Nor did the prosecutor knowingly rely on perjured testimony or false evidence. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (Due process is violated "if a State has contrived a conviction . . . by the presentation of testimony known to be perjured."); see also *Giglio*, 405 U.S. at 153–54; *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31–32 (1957). Thus, Stumpf cannot show that the prosecutor violated due process in offering the plea, or in acquiescing in Stumpf's acceptance of it. The prosecutor fully disclosed all evidence of which he was aware, and dealt with Stumpf and his attorney in good faith. That fact is not changed merely because other evidence later became available.

2. Nor does Stumpf's claim fare any better as a challenge to the State's refusal to allow him to withdraw his guilty plea once the new evidence came to light. As a procedural due process claim, Stumpf's claim here is akin to the claim advanced in *Herrera*. There, the defendant contended that new evidence of actual innocence entitled him to a new trial, much like Stumpf here argues that new

evidence of actual innocence entitles him to withdraw his guilty plea (thereby resulting in a new trial). 506 U.S. at 407–08. As the Court observed, though, courts must defer to legislative judgments regarding review of later-discovered evidence:

> Because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, we have exercis[ed] substantial deference to legislative judgments in this area. Thus, we have found criminal process lacking only where it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Id. at 407–08 (quotation marks and citation omitted; alteration in original). Thus, the Court upheld a Texas procedural rule that barred *any review* of the new evidence whatsoever (owing to the time that had passed since conviction). According to the Court, the ability to present that evidence in a request for clemency was sufficient to meet the defendant's due process rights. 506 U.S. at 411–17.

Stumpf has far greater procedural rights under Ohio law than those the Court has already upheld as constitutionally-compliant in *Herrera*. Far from foreclosing Stumpf from presenting the evidence, Ohio rules allowed him to litigate the issue in three separate courts, each of which had all of the "newly discovered evidence" before it. Immediately after Wesley's verdict, Stumpf filed a motion at the trial court seeking to withdraw his plea based on the "new evidence." He also attached the transcripts of Wesley's and Eastman's testimony from Wesley's trial to that motion, putting all the evidence before the courts. Pet. App. 267a. When his trial court motion failed, Stumpf also litigated the issue as part of his direct appeal in both the intermediate appellate court and the Ohio Supreme Court. And all three of these courts

considered his claim on the merits. That is far more process than was available in *Herrera*. Moreover, as in *Herrera*, Stumpf has the ability to use the evidence to support a clemency request. In short, the abundant avenues for state review of the "new evidence" clearly satisfy the procedural requirements of the Due Process Clause.

Nor does the claim fare any better as a substantive due process claim. It surely could not have violated substantive due process to hold Stumpf to his plea once made. As the dissent below cogently observed, the prosecutor in this case could not have been "remiss in relying on Stumpf's acknowledgment of guilt." Pet. App. 53a. It is well established that prosecutors may rely on a defendant's statement that he is guilty. After all, "a guilty plea is an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Indeed, a counseled plea constitutes "an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (emphasis added). Nor is Ohio aware of *any* due process decision from the Court requiring a prosecutor to agree to a new trial, or forbidding a conflict-free prosecutor from vigorously representing the State. The only possible exception to this rule is an actual innocence claim, but, as shown below, Stumpf cannot avail himself of that exception. Accordingly, even if habeas allowed collateral attacks on guilty pleas (or on the State's refusal to allow the withdrawal of a guilty plea), Stumpf has not established a viable due process claim here.

4. Stumpf cannot make an "actual innocence" claim, as no such claim exists in habeas, and, in any event, Stumpf is not actually innocent.

At the end of the day, Stumpf's due process claim boils down to some species of "actual innocence" claim. He

believes that the new evidence shows he is not guilty of aggravated murder, and that his conviction thus cannot stand. But that argument fails for two reasons. First, the Court has expressly held that "actual innocence" is not a free-standing constitutional claim. Thus, it cannot, in and of itself, support a grant of habeas. Second, even if it could, Stumpf cannot demonstrate actual innocence here under the stringent standards set forth in *Herrera*, *supra*, and *Schlup v. Delo*, 513 U.S. 298 (1995).

As the Court observed in *Herrera*, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Or, stated alternatively, "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Id.* (quotation marks and emphasis omitted). That is, habeas does not extend "to freestanding claims of actual innocence." [5] *Id.* at 404–05.

But that is precisely the type of claim that Stumpf presses here. Stumpf points to Eastman's testimony from Wesley's trial to show that Stumpf himself was not the shooter, and thus is not guilty of the crime. And in making that claim, Stumpf triggers the exact problem the Court discussed in *Herrera*. Granting Stumpf a conditional order of relief would "in effect require the State to retry petitioner [20] years after his [guilty plea], not because of any constitutional violation" in accepting the plea, "but simply because of a belief that in light of petitioner's new-found

[5] To the extent that *Herrera* suggests that a petitioner can advance an "actual innocence" claim to prevent his execution, that is irrelevant here. 506 U.S. at 417. The Sixth Circuit did not vacate Stumpf's death sentence. Rather, the court vacated his aggravated murder conviction. Thus, this case does not present the "actually innocent of the death penalty" issue.

evidence a jury might find him not guilty at" a new trial. *Id.* at 403. The problem, of course, is that "there is no guarantee that the guilt or innocence determination would be any more exact." *Id.* In short, the new evidence, even if it demonstrated his actual innocence, would not entitle him to relief in habeas.

The Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), shows that this rule barring free-standing "actual innocence" claims applies with full force in guilty plea cases. There, after the defendant pleaded guilty, he sought to challenge in habeas the factual basis of his plea. To be sure, the Court, in the context of discussing his claim, discussed the standards for "actual innocence." But, the Court never suggested that the petitioner could make a free-standing "actual innocence" claim. Rather, the Court merely held that a petitioner could use actual innocence to overcome the procedural default that would otherwise arise as a result of his failure to challenge the "knowing and voluntary" aspect of his plea during direct review. 523 U.S. at 623. Allowing such use of "actual innocence" is entirely consistent with *Herrera*'s recognition that actual innocence "is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 506 U.S. at 404. But Stumpf does not have any "otherwise barred constitutional claim[s]"; instead, he asserts that the existence of the new evidence, in and of itself, entitles him to withdraw his plea.

Moreover, even if actual innocence were a freestanding claim, Stumpf could not succeed on it here. To show it, even in the procedural default context, the habeas petitioner must show that "'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup*, 513 U.S. at 327–28). As a quick review of "all the evidence" shows, Stumpf cannot hope to demonstrate that he is "actually

innocent." Stumpf admits he helped rob the Stouts, Stumpf Hr'g Tr. 500–01 (Sentencing Hr'g); Stumpf admits that the weapon that killed Mrs. Stout was in his hands when the robbery began, *id.*; Stumpf admits that during the robbery, immediately before Mrs. Stout was shot, he shot Mr. Stout in the head twice, *id.* at 502; and Stumpf admits that after the robbery, he again had the gun, when he disposed of it by tossing it out the window of the car he and Wesley stole from the Stouts, *id.* at 503. And Wesley, the only eyewitness to the crime, besides Stumpf himself, says that Stumpf shot her. In short, Stumpf cannot hope to show that "no reasonable juror would have convicted him." Thus, even if actual innocence were a freestanding habeas claim, it is not available to Stumpf here.

C. The Sixth Circuit's newly minted due process right poses a serious threat to the finality of guilty pleas.

As the Court has recognized, vacating any conviction in habeas corpus has tremendous social costs. It may be difficult or impossible to retry the defendant. *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986). Such a retrial may be impossible because of the "erosion of memory and dispersion of witnesses that accompany the passage of time." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotation marks omitted). Even if a defendant can be successfully retried, there will be "the expenditure of additional time and resources for all the parties involved . . . and the frustration of society's interest in the prompt administration of justice." *Id.* (quotation marks omitted). Moreover, any undermining of the finality of criminal convictions will undercut much of the "deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989).

These costs are amplified when the defendant has pleaded guilty. Just this year, the Court explained that guilty pleas are "are indispensable in the operation of the modern criminal justice system." *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004). Indeed, the Court

explained that, in crafting rules seeking to vacate guilty pleas, courts should "respect the particular importance of the finality of guilty pleas," which, "usually rest, after all, on a defendant's profession of guilt in open court." *Id.* Moreover, the procedural benefits of guilty pleas—speed, economy, and finality—will be lost if rules for vacating guilty pleas are made too lenient. *Blackledge v. Allison*, 431 U.S. 63, 71–72 (1977).

The Sixth Circuit's new rule poses a serious threat to all of these interests. In particular, the State will be reluctant to accept guilty pleas in cases involving multiple defendants, out of a justified fear that a defendant who pleads guilty will later attack the plea based on "inconsistent" evidence presented against a later-tried co-defendant. This could seriously undermine the State's interests, particularly where the State would otherwise seek to plea bargain in exchange for the defendant's cooperation in the prosecution of others involved in the crime. And where a plea is later overturned based on "inconsistent" evidence, the State runs the risk that the co-defendant will attack his or her conviction on the same ground. Of course, given that there is usually no evidence of record in a guilty plea case, the State will have great difficulty showing that a co-defendant's subsequent prosecution was not somehow "inconsistent" with the defendant's plea.

There is no good reason to wander down this thorny path. Stumpf made the strategic choice to admit his guilt based on all of the available evidence. He "understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for." Pet. App. 58a (Boggs, C.J., dissenting). And the record evidence abundantly demonstrates that he is guilty as charged. Neither the law nor the facts support the decision below vacating his plea, and with it, his murder conviction.

CONCLUSION

For all of the above reasons, the Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

February 22, 2005

APPENDIX A

Constitutional Provisions

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Fifth Amendment provides, in relevant part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself."

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

APPENDIX B

Ohio Revised Code § 2901.22. Culpable mental states. (as amended by Amended Substitute House Bill No. 511, effective Jan. 1, 1974).

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

* * *

APPENDIX C

Ohio Revised Code § 2903.01 (1984). Aggravated Murder. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed

during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

APPENDIX D

Ohio Revised Code § 2923.03. Complicity. (as amended by Amended Substitute House Bill No. 511, effective Jan. 1, 1974).

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the follow ng:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed. But a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

APPENDIX E

Ohio Revised Code § 2929.03. Imposing sentence for a capital offense. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised

the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the reques of the defendant, shall require a pre-sentence investigation to he made and, upon the request of the defendant, shall require a mental examination to be made, and sl all require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division,

or be used in evidence against the defendant on the issue of guilt in any re-trial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three

judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it

found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

APPENDIX F

Ohio Revised Code § 2929.04. Criteria for imposing death or imprisonment for a capital offense. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable causes to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

APPENDIX G

Ohio Revised Code § 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

APPENDIX H

Ohio Rule of Criminal Procedure 11(C)(3). Pleas, Rights Upon Plea.

* * *

With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

* * *